LEE BOON TUAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Ismail Khan J.) April 11, 1960]

[Seremban — Criminal Appeal No. 15 of 1959]

Criminal Law and Procedure — View of locus in quo — Trial partly held at scene of accident — Whether "open space" constitutes Court — Criminal Procedure Code (Cap. 6), ss.2, 7 and 419.

Evidence — Part recorded at scene of accident — Whether admissible — Function of Magistrate.

In this case the appellant had been convicted and sentenced on a charge under section 304A of the Penal Code of causing death by a rash act while being the driver of a motor vehicle. Part of the evidence was recorded by the learned Magistrate at the scene of the accident. The appellant contended that the evidence at the scene of the accident was wholly inadmissible against him, and in support of this contention it was argued, *inter alia*, that the learned Magistrate was merely entitled to view the scene in the presence of the parties and should have recorded oral evidence in open Court, because the scene itself was not a public place.

Held: (1) a Magistrate sitting alone exercises the function of both Judge and Jury;

(2) as the scene of the accident in this case was within the local area over which the Magistrate had jurisdiction it could not be argued that a part of the trial was held in a wrong local area within the meaning of section 419 of the Criminal Procedure Code (Cap. 6);

(3) there is nothing in the Criminal Procedure Code which limits the right of the Court to conduct any inquiry or try any offence outside the Court building so long as the public are not specifically excluded.

Cases referred to:—

(1) *Tameshwar* v. *R.* [1957] A.C. 476; [1957] 3 W.L.R. 157; [1957] 2 All E.R. 683; 41 Cr. App. R. 161, P.C.

(2) *Scott* v. *Scott* [1913] A.C. 417.

(3) *Tong Peng Hong* v. *Public Prosecutor* [1955] M.L.J. 232.

(4) *Dilworth* v. *Commissioner of Stamps* [1899] A.C. 105.

MAGISTRATE'S CRIMINAL APPEAL.

R. H. V. Rintoul for the appellant.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: The appellant, the driver of a motor vehicle, was charged with and convicted of an offence of causing death by a rash act punishable under section 304A of the Penal Code. He was sentenced to pay a fine of $700 and this appeal is against such conviction and sentence.

The charge does not set out the particulars of the rash act complained of and as such is defective. It is, however, clear from the evidence that the accident occurred as a result of the appellant suddenly swerving to the right to enter a side road. The driver of the scooter was coming from the opposite direction along the main road on its correct side and there is no suggestion that it was travelling at an immoderate speed. From the evidence of Singaram P.W. 8, which was believed, it is clear that the distance between the scooter and the car when he first noticed them was over 30 yards, and the learned Magistrate was justified in coming to the conclusion that the appellant undertook a risk by taking a sudden swerve to the right in the path of the scooter. I am satisfied on the evidence that he did not keep a proper lookout, and though I am not prepared to hold on the evidence that there was on his part such a rash act as would attract the operation of section 304A, he was certainly guilty of negligent or inconsiderate driving.

Mr. Rintoul for the appellant did not object to the charge as framed but contended himself with attacking the finding of the learned Magistrate. The charge though irregular in my opinion did not mislead the defence and cannot be said to have caused a substantial miscarriage of justice.

It was strenuously contended by Mr. Rintoul that at the end of the case for the prosecution the learned Magistrate found only two ingredients of the offence proved, that the driver of the motor scooter had died and that death was caused by the appellant.

For myself I do not read the judgment in that light. The learned Magistrate proceeded to discuss the evidence of P.W. 3 and came to the conclusion that P.W. 3's evidence was trustworthy and established negligence of the appellant.

The only point of substance is Mr. Rintoul's contention that the evidence recorded at the scene of the accident was wholly inadmissible against the appellant for the reasons that:

(1) the learned Magistrate was merely entitled to view the scene in the presence of the parties and should have recorded oral evidence in open court;

(2) he was influenced by 2 factors, that Paul Street was a busy street with heavy traffic; and that Paul Street is straight and broad and that there was at the time of the accident no obstruction to the view. (I may remark that it was neither the case for the prosecution nor the defence that at the time of the accident there was heavy traffic on the road and that the appellant's view was obstructed in any way by any on-coming traffic or pedestrians);

(3) the learned Magistrate should not have had measurements taken at the scene even though without dissent from counsel for the appellant and in the presence of the parties, or made any observations at the scene of the accident. It was objected that he thus converted himself into a witness.

It is not denied that the learned Magistrate was well within his right and it would indeed be his duty to visit the scene of the accident with a view to a proper appreciation of the evidence; that Paul Street itself is straight and broad is a physical fact which is incapable of being controverted.

I agree that the learned Magistrate had no right to presume that at the time of the accident there was heavy traffic. That would solely depend upon oral evidence as to the state of affairs at the time of the accident.

But the conviction of the appellant on the charge did not in the remotest degree depend on that factor. The learned Magistrate came to the conclusion that the appellant's explanation

was wholly unacceptable, that the accident was caused as a result of the appellant suddenly without any warning turning into Jalan Abdul Malek from Paul Street when he knocked into the driver of the motor scooter and the impact took place on the appellant's off-side. That in my view is clear evidence of inconsiderate driving.

A Magistrate sitting alone exercises the function of both Judge and Jury. The point which Mr. Rintoul argued is that evidence taken at the spot, in spite of the fact that the appellant was given all facilities for cross-examination, was wholly inadmissible because the place itself he contended is not a public place. The place where part of the trial took place was within the local area over which the Magistrate had jurisdiction. As such, it could not be contended that the trial was held in a wrong local area within the meaning of section 419 of the Criminal Procedure Code and the trial is not vitiated because witnesses in his presence gave demonstrations and answered questions on oath subject to cross-examination. The Magistrate himself having attended the view and seen the demonstrations of witness, it cannot be said that he overlooked anything material and his judgment cannot be challenged as coming within the exception of *Tameshwar* v. *The Queen*[1].

It is contended that the evidence was inadmissible for the simple reason that part of the trial took place elsewhere than in open court and Mr. Rintoul relied on *Scott* v. *Scott*[2].

The trial was partly held at the junction of Paul Street and Jalan Abdul Malek; the learned Magistrate neither declared that the public be excluded nor did he specifically invite members of the public to attend the trial. It was conducted in open thoroughfare to which the public had access. There was no exclusion of the public by the express direction of the Magistrate preventing attendance by the general public as in *Scott* v. *Scott* quoted by Mr. Rintoul. Whether a trial in those circumstances could be held to be illegal depends in my opinion entirely on the interpretation of section 7 of the Criminal Procedure Code which enacts:

> "the place in which any criminal court is held for the purpose of trying an offence shall be deemed an open court to which the public generally have access."

I observe here that the trial was not held in *camera* nor that the interpretation of the expression "the place in which any criminal court is held" is necessarily confined to the very building that has been set up by the State for the conduct of a trial. Unless any obstacle is placed in the way of the general public to access for the purpose of attending a trial (and there is no evidence to that effect) the place where the trial is held is declared to be an open court to which the public may generally have access within the meaning of section 7.

That is what the legislature has provided and it has stressed the fact that the place itself rather than the building is to be regarded as an open court. There is nothing in the Code which limits the right of the Court to conduct any inquiry or try any offence outside the Court building so long as the public are not specifically excluded. The function of the Court is limited to interpretation. The words "place" and "deemed to be" are destructive of Mr. Rintoul's argument that the trial must necessarily take place in the court house with open doors. The deeming section is, in the language of Thomson J. (as he then was) in *Tong Peng Hong* v. *Public Prosecutor*[3] "crystal clear and compelling". "Place" is defined in section 2 of the Criminal Procedure Code. It says "includes" which is a word of extension, not of restrictive definition, as was held in *Dilworth* v. *Commissioner of Stamps*[4]. There is nothing in the context which gives it a colour restricting it to the very court house with open doors in which such proceedings are normally held.

I confess I have come to the conclusion with great hesitation and with some reluctance, because I feel that where a proceeding affecting the freedom of the individual is concerned, is conducted albeit in an open space to which the public if so minded could have access, it is not the court house which is generally known to the public as the place of trial.

I am not prepared to agree with the learned Deputy that there was sufficient evidence of rash act within the meaning of section 304A of the Penal Code, but I am satisfied that the appellant is guilty of inconsiderate driving. I accordingly convict him on the lesser charge under section 5 of the B.M.A. Motor Vehicles (Driving Offences) Proclamation No. 42/46 and impose a fine of $100, in default two months' imprisonment. The difference between fine paid and this fine of $100 be refunded.

I feel this is a matter of considerable public importance and if any application is made to me by counsel for the appellant, I shall be prepared to refer the question of law for the determination of the Court of Appeal.

Sentence varied.

Solicitors: *Shearn Delamore & Co.*

MOHAMED IBRAHIM v. LIM TUAN HONG

[A. C. J. (Hepworth J.) May 26, 1960]

[Kuala Trengganu — Civil Appeal No. 12 of 1959]

Landlord and Tenant — Assignment of lease, whether effective — Trespasser — Claim for possession by landlord on death of tenant — No general denial under R.S.C. O.21 r.21 — Whether points of law not pleaded in Court below available to appellant — O.19 r.13.

The plaintiff/respondent was the landlord of one R., [deceased] the former tenant of the premises in dispute. R. had entered into an arrangement with the defendant/appellant by which the appellant paid off a part of R's debts to creditors. This arrangement was incorporated in an agreement to which R. and the appellant were parties. In accordance with this agreement which the appellant claimed was an assignment of K's tenancy, the appellant took possession of the premises prior to R's death. The plaintiff claimed that the appellant was in unlawful possession. Judgment was given to the